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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 64

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION *et al.*,

Respondents.

PETITION OF EASTERN AIR LINES, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 23, 1965

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FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION *et al.*,

Respondents.

PETITION OF EASTERN AIR LINES, INC., FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Eastern Air Lines, Inc. (Eastern) prays that a writ of certiorari issue to review (a) the opinion and order of the United States Court of Appeals for the Fifth Circuit entered on January 12, 1965 holding that "federal question jurisdiction did not attach" to the complaint in this case and (b) the order of that court entered on February 16, 1965 denying Eastern's petition for rehearing.

Opinions Below

The January 12, 1965 opinion of the Court of Appeals is reported at 340 F. 2d 104. It is unofficially reported at 51 CCH Labor Cases 19,433 and at 58 LRRM 2174. The order of the District Court dismissing the complaint and the order of the Court of Appeals denying Eastern's peti-

tion for rehearing are not reported. The opinion and the orders of both lower courts are attached as Appendix A hereto.

Jurisdiction To Review

The decision of the Court of Appeals which is sought to be reviewed was entered on January 12, 1965, and denial of rehearing by that court was entered on February 16, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether any "federal question" conferring jurisdiction on the District Court under 28 U.S.C. §1331 or §1337 was raised by the following allegations of Eastern's complaint:

(a) That the February 1961 strike against Eastern by defendants was "a violation of the Railway Labor Act, 45 U.S.C. 151 *et seq.*", in that it occurred during mediation by the National Mediation Board, and disrupted Eastern's operations in commerce contrary to the first stated purpose of the Railway Labor Act and had no legitimate objective based on a dispute with Eastern;

(b) That said strike was an unlawful interference with Eastern's duty under the Federal Aviation Act of 1958, 49 U.S.C. §1301, to "carry U. S. mail, and passengers and cargo, pursuant to its Certificates of Public Convenience and Necessity";

(c) That said strike was an unlawful "effort to force the National Mediation Board to reject" a report involving

United Air Lines which was issued under procedures specified in the Railway Labor Act; and

(d) That said strike was "an unlawful interference with the contractual obligations existing between plaintiff and its flight engineer employees . . . and its other employees" under contracts entered into as required by the Railway Labor Act.

Stated conversely, the question is whether the above issues should be left for determination by state courts even though they involve federal statutes.

2. Whether, having assumed jurisdiction to rule on the sufficiency of Eastern's complaint to state a federal cause of action, the courts below were required by the doctrine of "pendent jurisdiction" to retain jurisdiction to decide all issues.

3. Whether a union may call a completely irresponsible strike—without basis in either "major" or "minor" disputes under the Railway Labor Act (but intended to put "pressure" on the National Mediation Board in the performance of statutory duties)—which disrupts interstate and foreign commerce and processes of the Railway Labor Act, without being in violation of the Railway Labor Act or subject to any restraint or penalty within the power of the federal courts to impose.

4. Whether a carrier whose operations in commerce are so disrupted has standing in federal court to vindicate its right and duty to perform transportation of United States mail, passengers and cargo under a federally-issued certificate of public convenience and necessity.

Statutes Involved

Railway Labor Act §2, First and Ninth, 45 U.S.C. §§151a, 152, 44 Stat. 577, 48 Stat. 1168; §5, First, 45 U.S.C. §155, 44 Stat. 580, 48 Stat. 1195; and §§201, 202 and 203, 45 U.S.C. §§181, 182 and 183, 49 Stat. 1189.

Federal Aviation Act of 1958 §404, 49 U.S.C. §1374, 72 Stat. 760; and §405(d), 49 U.S.C. §1375, 72 Stat. 760.

These statutory provisions are set forth in Appendix B hereto.

Statement of the Case

Eastern seeks review of orders which upheld dismissal of its complaint by the District Court for the Southern District of Florida on the ground that "federal question jurisdiction did not attach" (Appendix A page 7). Jurisdiction in the District Court was predicated on 28 U.S.C. §§1331 and 1337, and the claim that the matter in controversy arose under the laws of the United States, specifically the Railway Labor Act (R. 4).* Diversity of citizenship jurisdiction under 28 U.S.C. §1332 was also asserted (R. 4).

The complaint of Eastern which was filed on February 18, 1961 alleged that at 10:00 p.m., February 17, 1961, Eastern's flight engineer employees at its various bases had started a strike or work stoppage in compliance with the direct orders of the defendants. It was alleged that this strike was in protest against the report of a committee appointed by the National Mediation Board in a class or craft dispute on United Air Lines (R. 7).

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* The printed record in the lower court is cited thus: "(R. ——)".

That report concluded that the pilots and flight engineers at United constituted a single craft or class for the purpose of collective bargaining. Previously on United the pilots and flight engineers had constituted separate crafts or classes for collective bargaining and were represented by the Air Line Pilots Association and the Flight Engineers International Association, respectively (R. 6).

The complaint alleged further that the report by the committee at United Air Lines had no effect on the status of defendants as representatives of Eastern's flight engineer employees, and that this strike or work stoppage was part of a general strike against all major airlines which have employees represented by the Flight Engineers International Association, in protest against the committee's report at United and in an effort to force the National Mediation Board to reject such report (R. 6, 7).

The complaint also reviewed the status of the major dispute then in progress between Eastern and the defendants. The last collective bargaining agreement had an expiration date of April 1, 1960 and prior to that date the parties had exchanged proposals for changes and thereafter had engaged in extensive negotiations. On July 22, 1960, the National Mediation Board had entered the case and docketed the case as A-6289. Thereafter, and up to the date of the complaint, negotiations had continued under the auspices of the National Mediation Board and the Board had not indicated that it felt that its efforts to bring about a settlement had failed, nor had the Board proffered arbitration under the terms of the Railway Labor Act (R. 4, 5).

The complaint alleged that the strike called by defendants for the alleged purposes and while the current major dispute was under the auspices of the National Mediation

Board was unlawful, as a violation of the Railway Labor Act, and was an unwarranted, unjustified and unlawful interference with interstate commerce, the business of Eastern, the contractual relationships between Eastern and its employees, and the performance by Eastern of its statutory duty to carry United States Mail, passengers and cargo, pursuant to its Certificates of Public Convenience and Necessity (R. 8, 9).

Irreparable damages, including direct monetary losses estimated at $900,000 per day, were alleged and Eastern requested relief in the form of a temporary restraining order without notice, a preliminary and permanent injunction and damages, both compensatory and punitive (R. 7, 9).

A temporary restraining order was issued by the District Court on February 18, 1961, directed to the defendants and all those persons in active concert or participation with them, in effect ordering an immediate end to the strike (R. 13). Despite the issuance of said restraining order and other similar orders involving other airlines, the flight engineer strike against Eastern, Pan American World Airways, American Airlines, National Airlines, Trans World Airlines and Flying Tiger Lines continued.

On February 21, 1961, Secretary of Labor Arthur J. Goldberg announced that he had recommended to the President that a special commission be appointed to review the "complex problems involved, performance of the flight engineer function, the job security of employees performing such function and related representation rights" (R. 21-24).

The Secretary requested that the flight engineers return to work while the commission made its study (R. 24).

Subsequently on the same day the commission was appointed by Executive Order of the President.

Meanwhile, on February 20, 1961, Eastern had filed various motions that certain of the defendants be held in contempt. Based on a hearing held on February 21, the court on February 23, 1961 held the Miami Council of the Flight Engineers International Association in contempt and fined that organization $200,000 (R. 14-17).

On that same day (February 23) the strike ended when at approximately 4:00 p.m. the flight engineers returned to work (R. 20).

On March 10, 1961, the court held the Flight Engineers International Association, EAL Chapter, in civil contempt and fined that organization $25,000 (R. 18-19). That contempt order was reversed on the ground that the proceeding should not have been for civil contempt (R. 25, 26). *Flight Engineers* v. *Eastern Air Lines, Inc.*, 301 F. 2d 756 (5th Cir. 1962).

Although the requests for injunctive relief were moot after the return to work of the flight engineers on February 23, this action was continued by Eastern for the damages caused by the wrongful strike which lasted from 10:00 p.m. February 17, 1961 to 4:00 p.m. February 23, 1961.

The District Court dismissed the complaint on December 6, 1963 (R. 26-27) on the grounds that no diversity of citizenship existed and "there is no Federal Question." The Court of Appeals affirmed on January 12, 1965 (Appendix A) and on February 16, 1965 it denied Eastern's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Decision Conflicts With Decisions Of This Court and Decisions of Other Courts of Appeals In Holding That No Federal Question Is Raised By Eastern's Complaint.

The complaint specifically raises the following federal questions:

(1) Whether a strike against Eastern is unlawful under the Railway Labor Act if it (a) occurs during (and disrupts) mediation by the National Mediation Board of a "major dispute" between the union and Eastern, (b) disrupts commerce and the operations of Eastern and (c) arises out of a dispute to which Eastern is not a party (R. 6-7).

(2) Whether a strike against Eastern is unlawful which, having no legitimate labor objective in the form of a dispute with Eastern, interferes with Eastern's duty under the Federal Aviation Act to "carry United States Mail, and passengers and cargo, pursuant to its Certificates of Public Convenience and Necessity" (R. 9).

(3) Whether a strike against Eastern is unlawful where its objective is "to force the National Mediation Board to reject" a report at United Air Lines which was issued pursuant to the duties of the Board under §2, Ninth of the Railway Labor Act (R. 7, 9).

(4) Whether a strike against Eastern is unlawful where, having no legitimate labor objective, it interferes with "the contractual obligations existing between plaintiff and

its flight engineer employees" under contracts which the Railway Labor Act *requires* both Eastern and respondents to *"make* and *maintain"* (R. 9; Railway Labor Act, §2, First).

It is well settled that such a clear specification of claims under federal statutes is sufficient to invoke "federal question" jurisdiction. As this Court held in *Bell* v. *Hood,* 327 U. S. 678 (1946), the plaintiff is "master" to decide whether federal or state law shall be invoked, and "where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . *must* entertain the suit" except where the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous" (emphasis added). See also *Siler* v. *Louisville & N. R.R.,* 213 U. S. 175 (1909), and 2 *Moore's Federal Practice* 397 (2nd Ed. 1964). No suggestion has been made, or could be made, that Eastern's federal claims are frivolous or immaterial.

The Court of Appeals recognized the existence of the federal questions, as it proceeded to *decide* some of them, holding:

1. That "the Railway Labor Act does not expressly prohibit a strike" over issues other than "major" or "minor" disputes with the carrier (as such disputes are defined in *Elgin, J. & E. Ry.* v. *Burley,* 325 U. S. 711 (1945) and *Railroad Trainmen* v. *Chicago River & I. R. R.,* 353 U. S. 30 (1957));

2. That "we find no other provision of the Railway Labor Act which expressly places in Eastern Airlines the right to bring an action in the Federal District Court to

enjoin or seek damages for a breach of the employment contract";

3. That injunctive relief or damages for breach of the employment contract would be available "under normal, common-law principles" and "without reference to the Railway Labor Act" and "recovery or denial of recovery for the breach of contract alleged here is in no wise dependent upon an interpretation of the Railway Labor Act"; and

4. That the holder of a certificate of public convenience and necessity issued under the Federal Aviation Act has no "obligation" (and apparently no right) to vindicate in federal court its right and duty to perform under that certificate.

Having reached these conclusions based on its own interpretation of the Railway Labor Act and the Federal Aviation Act, the Court of Appeals inconsistently held that there was no "federal question", that the action must be dismissed, and, in effect, that all of the foregoing interpretations of the Railway Labor Act and the Federal Aviation Act should be made in an action which could be maintained *only in a state court.*

As will be demonstrated in the next division of this petition, the doctrine of "pendent jurisdiction" requires the lower courts to retain jurisdiction to decide non-federal issues once they assume jurisdiction—as in this case—to decide federal questions.

In this division of the petition, we shall demonstrate that the ruling of the Court of Appeals with respect to the federal questions presented conflicts with decisions of this Court and decisions of other courts of appeals on similar questions.

A. *The Court of Appeals Decision Conflicts With Decisions Of This Court and Of Other Courts In Holding That the Railway Labor Act Does Not Prohibit A Strike Such As That Here Involved.*

Eastern's contention that the Railway Labor Act prohibits the strike involved in this action is predicated on the following major factors:

(1) §2 of the Act states its *first* purpose to be:

> "1. To avoid *any* interruption to commerce or to the operation of any carrier engaged therein" (emphasis added).

(2) §2, First of the Act imposes the following specific obligations on both the union and the carrier:

> "First. It shall be the *duty* of all carriers, their officers, agents, and employees to exert *every reasonable effort to make and maintain agreements* concerning rates of pay, rules, and working conditions, and to settle *all disputes*, whether arising out of the application of such agreements *or otherwise* . . ." (emphasis added).

(3) §5 of the Act authorizes the National Mediation Board to intervene in not only "major disputes" ("concerning changes in rates of pay, rules, or working conditions") but also "any other dispute" which is not a "minor dispute" (*i.e.*, "not referable to the National Railroad Adjustment Board"), and in "any labor emergency" which "is found by it to exist at any time", and a stated consequence of such Mediation Board intervention in *both* "major disputes" and "any other dispute" or "labor emergency" is that the "status quo" must be maintained throughout such intervention. See also the parallel provisions in §§201, 202 and 203 which specifically apply to airlines.

(4) The purpose of the strike—to "bring pressure on the National Mediation Board" and "to force the National Mediation Board to reject" a report issued at United Air Lines pursuant to the Board's functions under §2, Ninth of the Act—was plainly unlawful.

(5) In view of the history of the "right to strike"—carefully limited by legislation and by judicial decision to "legitimate" labor objectives"—it is inconceivable that the Railway Labor Act (whose *first* purpose is to prevent *any* interruption of commerce) could be construed to prohibit strikes over legitimate employer-employee issues (*Chicago River* case, *supra,* and *Locomotive Engineers* v. *Baltimore & O. R.R.,* 372 U. S. 284 (1963)) but to *permit* irresponsible strikes having *no* legitimate objective. See, generally, Frankfurter & Greene, *The Labor Injunction* (1930) Chapter I; Aaron, *The Labor Injunction Reappraised,* 10 U.C.L.A. L. Rev. 292, 14 Labor Law Journal 41 (1963); compare *In re Debs,* 158 U. S. 564 (1895), *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418 (1911) and *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229 (1917) with *United States* v. *Hutcheson,* 312 U. S. 219 (1941) and *Allen-Bradley Co.* v. *Electrical Workers,* 325 U. S. 797 (1945).

The Court of Appeals brushed these considerations aside with the finding that "the Railway Labor Act does not expressly prohibit a strike under the circumstances that existed in this case," and that no provision of the Railway Labor Act "expressly places in Eastern Airlines the right to bring an action in the Federal District Court to enjoin or seek damages for a breach of the employment contract."

The notion that remedies exist under the Railway Labor Act only if "expressly" stated therein pervades the Court of Appeals' decision in this case just as in the decision of

the same court in *Machinists* v. *Central Airlines*, 295 F. 2d 209 (5th Cir. 1961), *reversed*, 372 U. S. 682 (1963). There the Court of Appeals concluded that, because there was no *express* provision in the Act conferring jurisdiction on federal courts to enforce airline Adjustment Board decisions, no federal jurisdiction existed and any remedy must be sought in a state court. This Court rejected the conclusion of the Court of Appeals that there was such a "hiatus in the statutory scheme", and held that the statutory duty under §204 "to establish a Board of Adjustment" (comparable with the duty under §2, First "to make and maintain agreements") was "legally enforceable in the courts" and that:

> "If these contracts are to serve this function under §204, their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity."

This Court further held that "If any provision contained in a §204 contract is enforceable, it is because of congressional sanction," citing *Railway Department* v. *Hanson*, 351 U. S. 225 (1956) for the proposition that a "union agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it . . .". This Court concluded that "the §204 contract, like the LMRA §301 contract, is a federal contract and is therefore governed and enforceable by federal law, in the federal courts." See the reconfirming statement of this Court in *Republic Steel Corp.* v. *Charlie Maddox*, —— U. S. ——, 85 Sup. Ct. 614 (January 25, 1965) that "the Court has made it clear that substantive federal law applies to suits

on collective bargaining agreements covered by §204 of the Railway Labor Act", citing the *Central Airlines* case.

Here, as in the *Central Airlines* case, this Court should reject the idea that there is a "hiatus in the statutory scheme" which would require a party to seek a remedy in state court for violation of a Railway Labor Act duty to make and maintain agreements. Here, as in the *Central Airlines* case and numerous other cases, the Court should also reject the notion that federal court remedies exist only where they are "expressly" stated in the Act. While federal courts have granted injunctions many times under the Railway Labor Act, *no* injunction was based on an "express" provision authorizing injunctive relief and the injunctive power in each instance was inferred from a statutory requirement which was no more specific than the provisions relied on by Eastern in this case.

In *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515 (1937), the injunction requiring the carrier to bargain with the union was predicated on the statutory requirement that the carrier deal with the certified representative of the employees.

In the *Chicago River* case, *supra,* the injunction was based on the Court's finding that a strike over "minor" disputes would nullify the statutory procedure which gave "either party" the right to obtain "final and binding" determination of such disputes from the Adjustment Board.

In *Steele* v. *Louisville & N. R. R.,* 323 U. S. 192 (1944), the Court inferred that the exclusive bargaining agent under the Act had a duty to represent all employees fairly and that such duty could be enforced by the Court.

Here, of course, the injunctive power (and the power to award damages) may be inferred at least as readily from

the clear statutory purpose "to avoid any interruption to commerce or to the operation of any carrier engaged therein", and the statutory duty of the union to "make and maintain agreements" and to "settle all disputes, whether arising out of the application of such agreements or otherwise", as well as the clear implication that the Mediation Board's functions under §2, Ninth shall be performed without the type of unlawful "pressure" which the defendants sought to exert through their strike.

If the Court of Appeals decision stands, a union which is unable to strike over either "major" or "minor" disputes (*i.e.*, legitimate disputes with the carrier) could strike on any other issue which it might select (political, social, economic or even personal) and thus, with complete irresponsibility and absolute impunity under federal law,

(a) disrupt commerce and carrier operations as effectively as if a legitimate labor objective were in view,

(b) prevent good faith bargaining over pending issues with the carrier as effectively as if such issues caused the strike and

(c) in many cases, at least, influence the course of pending bargaining as drastically as if the strike were directly and publicly aimed at influencing the negotiations.

The lower court's decision would further require that any remedy to prevent such evasion of the Railway Labor Act and undermining of the Federal Aviation Act must be devised and applied by *state* courts even though the statutes involved are *federal*.

Such abdication by federal courts is unprecedented. The purposes of these federal statutes must be protected by

federal courts from the erosion which might result from multiple state court actions.

Other courts have recognized the existence of a federal court remedy to prevent a strike and require a union to "make and maintain agreements" under the Railway Labor Act even where the strike is caused by issues other than "major" or "minor" disputes between the employer and employees. In *American Airlines, Inc.* v. *Transport Workers Union,* 50 CCH Labor Cases 19,258 (S.D.N.Y. 1964), Judge Palmieri held that a union cannot use a "dispute" other than its own as a basis for disturbing the status quo under the Railway Labor Act. With reference to the duty to make and maintain agreements, Judge Palmieri held as follows:

> "The TWU's failure to give prior notice, or to initiate the statutory procedures itself which might have settled the matter peacefully, violated the duty imposed by Section 2, First, of the Railway Labor Act, which requires both parties to 'exert every reasonable effort' to reach agreements and 'avoid any interruption to commerce or to the operation of any carrier' as a result of a dispute (45 U.S.C.A. §152 First). See also *Belt Railway Company* v. *Locomotive Engineers,* —— F. Supp. ——, 45 C.C.H. L. C. 17,703 (N. D. Ill. 1962). The basis of the preliminary injunction in *American Airlines, Inc.* v. *Transport Workers Union,* 202 F. Supp. 806 at 811 (S.D.N.Y. 1962), was the TWU's threat to resort to self-help 'without making any attempt to use the elaborate machinery provided for labor disputes'."

In *KLM* v. *Transport Workers Union,* 49 CCH Labor Cases 18,990 and 19,170 (E.D.N.Y. 1964) Judge Mishler enjoined a strike by TWU which arose during mediation with KLM, but out of a dispute between the TWU and *another* employer. The court stated that "the difficult task

faced by the Mediation Board would be rendered hopeless by misuse of the right to informational picketing" and held:

> "The right to strike is suspended by the Railway Labor Act in major disputes until the mediation procedures are exhausted. Resort to the services available are mandatory. Good faith effort to resolve disputes and exhaustion of the processes is a condition precedent to the use of economic pressures and forces."

It should be noted that in other cases arising out of the same nation-wide flight engineers' strike, in February 1961, other airlines affected obtained federal court injunctions even though, of course, the "dispute" in each case was between the strikers and the Mediation Board, just as it was in the case of Eastern's strike. *Pan American World Airways* v. *FEIA,* C.A. No. 61C131, E.D.N.Y., February 18, 1961; *American Airlines* v. *FEIA,* N. D. Tex., February 18, 1961, 303 F. 2d 5 (5th Cir. 1962).

Federal courts clearly have jurisdiction to require that the parties bargain in good faith in accordance with the Railway Labor Act. *Ruby* v. *American Airlines,* 329 F. 2d 11 (2d Cir. 1964); *Rutland Ry.* v. *Locomotive Engineers,* 307 F. 2d 21 (2d Cir. 1962); *Pan American World Airways* v. *Transport Workers,* 45 CCH Labor Cases 17,801 (E.D.N.Y. 1962); and compare *Virginian Ry., supra.* When Eastern alleged (R. 8) that the union struck during mediation, thus disrupting the processes of the Railway Labor Act for settlement of the "major" dispute, Eastern thus invoked the most fundamental jurisdiction of the federal courts under the Act. Clearly, "good faith bargaining" does not include an irresponsible walkout in the midst of negotiations and the mediation sessions conducted by the National Mediation Board.

The fact that Eastern's cause of action as set forth in the complaint is a *federal* cause of action is now abun-

dantly clear as a result of the decision of this Court in *Republic Steel Corp.* v. *Charlie Maddox, supra.* As noted above, the Court there held, reaffirming the decision in the *Central Airlines* case, "that substantive federal law applies to suits on collective bargaining agreements covered by §204 of the Railway Labor Act". Re-emphasizing the same point, the Court stated (footnote 15) that, even if there were no applicable arbitration clause, "Of course a court suit on the collective agreement would still be governed by federal law. *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448."

While it might be argued that "§204 of the Railway Labor Act" deals only with "agreements" establishing Adjustment Boards, it should be noted: (1) The Court refers to §204 and the *Central Airlines* case in the course of its essential reasoning in analyzing *Moore* v. *Illinois Central R. R.,* 312 U. S. 630 (1941), *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U. S. 653 (1953) and the *Maddox* case—all of which involve damage claims for breach of the basic collective bargaining agreement; and (2) §204 actually outlines procedures to be followed in handling claims for breach of the basic collective bargaining agreement, including the preliminary "grievance" steps as well as the Adjustment Board procedures themselves.

In footnote 14 to the majority decision the Court says:

> "By refusing to extend *Moore* v. *Illinois Central R. Co.* to §301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of administrative remedies provided by that act can be appraised in context, *e.g.,* the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the

Board to give the same remedies as could be obtained by court suit."

We interpret this reservation by the Court to mean simply that the Court is not yet ready to decide whether the contractual remedy provided by Federal substantive law is to be administered in specific cases by the Adjustment Board or by the federal court, as the peculiar "make-up of the Adjustment Board" and the possible limitations on its ability "to give the same remedies as could be obtained by court suit" may well call for a judicial remedy in many instances. But, as the Court states in the very next footnote (footnote 15), "a court suit on the collective agreement would still be governed by federal law."

The question of possible jurisdiction of the Adjustment Board was raised by the defendants in this case but a ruling on that issue was pretermitted by the District Court's decision that no federal question was present in the case. We are confident that the matters here involved are not proper subjects of Adjustment Board decision in view of the facts, among others, that: (a) the injunctive relief sought by Eastern could not be provided by the Adjustment Board, (b) the other relief sought in the complaint is properly a matter for judicial action, (c) defendants never made any attempt to refer the matter to the Adjustment Board, (d) the Adjustment Board which was created by agreement between Eastern and the defendants no longer exists, and (e) the defendants have lost their representation rights under the Railway Labor Act as a result of a certification issued by the National Mediation Board on June 4, 1964 designating the Air Line Pilots Association as the exclusive bargaining representative of Eastern's flight engineers. See *Flight Engineers* v. *National Mediation Board,* 338 F. 2d 280 (D.C. Cir. 1964).

The many factual and legal reasons why the Adjustment Board could not provide an adequate remedy in this case will, of course, be presented to the District Court upon remand.

From all the foregoing it is clear that Eastern's complaint states a good cause of action for violation of the Railway Labor Act, and that the decision of the Court of Appeals is contrary to the decisions of this Court and other federal courts.

B. *The Court of Appeals Decision Conflicts With Decisions of Other Courts of Appeals In Holding That a Federal Court Has No Jurisdiction To Vindicate the Rights of a Carrier Under Its Federal Certificate of Public Convenience and Necessity.*

The Court of Appeals opinion states:

> "We find no authority for the proposition that the holder of such a certificate is under any obligation to vindicate the rights of the United States, either in seeing that the mails are carried without interference or that interstate commerce be not interfered with by filing a suit in a Federal District Court."

It may be noted that the court cites no authority for the opposite proposition, and does not suggest what agency of the Government would have either standing or incentive to rescue the travelling and shipping public or save the certificated carrier from bankruptcy. It should be noted that the "national emergency" injunctive provisions of the Taft-Hartley Act (29 U.S.C. §§176-182) do not apply to carriers subject to the Railway Labor Act, and there is no agency such as the National Labor Relations Board to obtain injunctions in cases of "unfair practices" on the airlines and railroads (29 U.S.C. §160); and it would therefore seem reasonable to assume that Congress ex-

pected national emergencies to be dealt with by airlines and railroads as in the past—through injunctions sought and obtained in federal court.

There is ample authority for the proposition that the holder of a certificate of public convenience and necessity has a *right* in federal court to vindicate *its* certificate rights and obligations and to prevent interference with delivery of the mails and the transportation of persons and property. A certificate of public convenience and necessity confers rights as well as obligations, and it should not be deemed surprising if a right conferred by federal statute could be protected by an action in federal court. Thus, where the federal courts have found no employer-employee "labor dispute" (either "major" or "minor") to exist as a basis for a strike, they have *uniformly* granted injunctions at the instance of the carrier whose certificated services were thus threatened. *Railroad Trainmen* v. *New York Central R.R.*, 246 F. 2d 114 (6th Cir. 1957); *Chicago & I. M. Ry.* v. *Trainmen*, 315 F. 2d 771 (7th Cir. 1963); *Toledo, P. & W. R.R.* v. *Trainmen*, 132 F. 2d 265 (7th Cir. 1942); *American Airlines* v. *Air Line Pilots Association*, 40 CCH Labor Cases 66,636 (N.D. Ill. 1960); *American Airlines* v. *Transport Workers, supra; KLM* v. *Transport Workers, supra.* As the court said in *Railroad Trainmen* v. *New York Central R. R., supra,* "it would be unjustifiable for a union to prevail upon its members to strike for a reason unconnected with issues of representation, employment, bargaining or contractual rights", and the Court there relied on language of Mr. Justice Brandeis in *Dorchy* v. *Kansas*, 272 U. S. 306, 311 (1926) to the effect that a strike "without just cause is unlawful."

Eastern's *right* under federal law to prevent such interference with its certificated operations thus appears to be adequately established. Whether Eastern has a correlative

duty to seek injunctive relief against unjustified interference with its certificated rights and obligations is not entirely clear. The Federal Aviation Act provides (49 U.S.C. §1374(a)) that "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers. . . ." See also §1375(d) which requires that the certificated carrier "shall" carry mail tendered by the Postmaster General. That duty may well include the obligation to use available means, such as the federal court injunctions which other carriers have been able to obtain in similar situations, to free the transportation system of unjustified interferences. See in this connection, *Montgomery Ward & Co.* v. *Northern Pacific Terminal Co.*, 128 F. Supp. 475 and 520 (D. Ore. 1954), where the paramount duty of carriers to perform their certificated obligations in the face of union interferences (and even agreements with unions) is discussed at length. Since, as noted above, there is no other method provided by Congress for obtaining injunctive relief in cases of national emergencies on the railroads and airlines, it would seem reasonable to expect the affected carriers to seek such relief, and this has been the uniform practice throughout the history of the Railway Labor Act.

Whether the seeking of injunctive relief against unjustified interference with commerce should be deemed an "obligation" or a "right", the fact is that numerous courts have held that injunctions may be granted by the federal courts in circumstances similar to those here presented, where the strike arose out of neither a "major" nor a "minor" dispute. When the United States Courts of Appeals for the Sixth Circuit and the Seventh Circuit, and

numerous eminent Federal District Courts, as noted above, have issued injunctions under the Railway Labor Act in similar situations, we submit that the Court of Appeals erred in stating that there is "no authority" for the position which Eastern takes in this case. The conflict between the decision below and the decisions of two other Courts of Appeals clearly requires review by this Court.

II.

The Court of Appeals Decision Conflicts With Decisions Of This Court and Decisions of Other Courts of Appeals In Refusing To Retain Jurisdiction Under the Doctrine of "Pendent Jurisdiction."

As noted above, while the Court of Appeals concluded (erroneously) that "federal question jurisdiction did not attach", that court actually *decided* (also erroneously) some of the federal questions presented. By thus purporting to decide the very questions of which it disclaimed jurisdiction, the Court of Appeals acted contrary to the specific ruling of this Court in *Bell* v. *Hood, supra,* where the Court said:

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy . . ."

Since Eastern's complaint did raise bona fide and substantial federal questions, and since the lower court did

purport to decide some of them, it necessarily follows that the federal court must retain jurisdiction to decide all issues and grant all relief to which Eastern is entitled. The lower court's adverse ruling on Eastern's federal claims does not affect its jurisdiction to decide all questions. As this Court held in *Siler* v. *Louisville & N. R. R., supra:*

> "The Federal questions . . . gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them . . ."

See also *Frost* v. *Corporation Commission,* 278 U. S. 509 (1929).

The doctrine of "pendent jurisdiction" requires that even though the federal claim asserted in a complaint is held to be without merit, the federal court retains jurisdiction to decide all claims based on the same set of facts. Thus, in *Hurn* v. *Oursler,* 289 U. S. 238 (1933), the federal court retained jurisdiction over a common-law claim of unfair competition after dismissal of a claim of federal copyright infringement based on the same facts. In *United Mine Workers* v. *Meadow Creek Coal Co.,* 263 F. 2d 52 (6th Cir. 1959), it was held that the federal court retained jurisdiction of a claim of common-law conspiracy based on the same facts as a claim of secondary boycott under the Taft-Hartley Act which was held to be without merit. See also *Rumbaugh* v. *Winifrede Railroad Co.,* 331 F. 2d 530 (4th Cir. 1964), *cert. denied,* 379 U. S. 929 (December 7, 1964), and *Fay* v. *Douds,* 172 F. 2d 720 (2d Cir. 1949).

Here, exactly the same facts support Eastern's claim of violation of federal law and the claim that its contract was breached by defendants. Hence, when the federal courts

rule on the substance of Eastern's federal claim, they retain jurisdiction to decide the contract claim even though it be deemed exclusively a state cause of action.

III.

The Court of Appeals Has Decided Two Federal Questions Which Have Not Been, But Should Be, Settled By This Court.

As demonstrated above, the Court of Appeals decision conflicts with decisions of this Court and of other federal courts in holding that no federal question was raised by Eastern's complaint and by refusing to retain jurisdiction as to all issues in the case. However, while disclaiming the existence of a federal question, the Court of Appeals decided two such federal questions which have not been definitively ruled upon by this Court but which are of such importance as to require that they be settled by this Court, namely:

(1) Whether a union may call a completely irresponsible strike—without basis in either "major" or "minor" disputes under the Railway Labor Act (but intended to put "pressure" on the National Mediation Board in the performance of statutory duties)—which disrupts interstate and foreign commerce and processes of the Railway Labor Act, without being in violation of the Railway Labor Act or subject to any restraint or penalty within the power of the federal courts to impose.

(2) Whether a carrier whose operations in commerce are so disrupted has standing in federal court to vindicate its right and duty to perform transportation of United States mail, passengers and cargo under a federally-issued certificate of public convenience and necessity.

The latter question, as noted above, has been decided contrary to the decision of the lower court by two other courts of appeals—the Sixth Circuit in *Railroad Trainmen* v. *New York Central R. R.*, *supra*, and the Seventh Circuit in *Chicago & I. M. Ry.* v. *Trainmen*, *supra*, and *Toledo, P. & W. R. R.* v. *Trainmen*, *supra*—as well as by other federal courts. Clearly, this sharp conflict between federal courts should be resolved by this Court.

The first question is of great importance to the Nation and to the airlines and railroads which are subject to the Railway Labor Act. The need for a decision by this Court is well exemplified by the facts of this very case. The strike against Eastern was part of a nationwide strike that threatened widespread human and economic damage. Five other major airlines were completely shut down along with Eastern (R. 23). The strike was eventually settled through the efforts of the President of the United States, the Secretary of Labor, the Chairman of the National Mediation Board and a Commission created by executive order of the President of the United States (R. 21, 22).

Defendants and the lower courts assert that there is a gaping loophole in the Railway Labor Act which permits such a disastrous and irresponsible work stoppage to occur at any time if the union selects, as its ostensible reason for striking, a "dispute" with a person or agency other than the carrier or a "dispute" with the carrier which is neither "major" nor minor". It is inconceivable that such a loophole exists in a statute whose *first* congressionally-stated purpose is "To avoid *any* interruption to commerce or to the operation of any carrier engaged therein" and whose *first* congressionally-stated duty imposed on carriers and unions is "to exert every reasonable effort to make and *maintain* agreements . . ." (emphasis added). Yet just such a loophole will exist throughout the Fifth Circuit (and in

any other Circuit which may follow the decision of the lower court) until this Court acts.

Clearly, a matter of such national importance under the Railway Labor Act should be decided promptly by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ E. Smythe Gambrell
/s/ W. Glen Harlan

Attorneys for Petitioner,
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William G. Bell, Jr.
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Of Counsel

Atlanta, Georgia
March 23, 1965

Certificate of Service

I, W. Glen Harlan, one of the attorneys for Eastern Air Lines, Inc. and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of March, 1965, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (and Appendices thereto) by mailing copies thereof, correctly addressed with first class air mail postage prepaid to the following, as required by Supreme Court Rule 33:

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Of Counsel for Respondents

/s/ W. Glen Harlan
W. Glen Harlan
Attorney for Eastern Air Lines, Inc.

March 23, 1965

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21312

EASTERN AIR LINES, INC.,

Appellant,

versus

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(January 12, 1965.)

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from an order of dismissal in the trial court which held that no "federal question" jurisdiction existed in this action brought by Eastern Air Lines, Inc. to enjoin a strike by Flight Engineers Local and seeking damages for losses occurring from the work stoppage. There being no basis for federal

jurisdiction, except under 28 U.S.C.A. § 6331, the federal question jurisdiction statute, the question posed for us is whether the complaint presents a claim that "arises under the constitution, laws or treaties of the United States."

For the purpose of testing the correctness of the trial court's judgment, we must consider the complaint, as filed by the appellant, because it is from the allegations of the plaintiff only that the court can determine whether the matter in controversy is one that arises under the Federal statutes. The complaint alleged the following state of facts:

At 10:00 P.M., February 17, 1961, Eastern Air Lines Flight Engineer employees, represented by Flight Engineers International Association, E.A.L. Chapter, started a strike or work stoppage in compliance with the orders of the Association. This strike was not in protest of any conduct of Eastern Air Lines and was not in connection with any then existing labor dispute with Eastern. It was in protest against the report of a committee appointed by the National Mediation Board in a class or craft dispute on United Airlines. This report contained recommendations to the National Mediation Board that were unacceptable to the Flight Engineers Association, and this strike or work stoppage was part of a general strike against all major airlines which had employees represented by Flight Engineers International Association in an effort to force the National Mediation Board to reject the committee's recommendation.

The complaint alleged that collective bargaining sessions were currently being held between the Association

and Eastern looking towards a new contract. This case had been docketed before the National Mediation Board. However, as stated, the strike bore no relation to these negotiations. The complaint alleged, nevertheless, that the strike, occurring while the negotiations were before the National Mediation Board (even though not related to them), was unlawful; that it was a violation of the Railway Labor Act and was an unwarranted, unjustified and unlawful interference with interstate commerce, the business of Eastern, the contractual relationship between Eastern and its employees, and the performance by Eastern of its statutory duty to carry United States mail, passengers and cargo, pursuant to its certificates of public convenience and necessity. It alleged that irreparable damages, including losses estimated at $900,000 per day would follow unless the strike was immediately enjoined. It sought both preliminary and permanent injunctions as well as a temporary restraining order, without notice, and compensatory and punitive damages.

A temporary restraining order was issued on February 18, 1961, and after some intervening skirmishes, the strike was terminated on February 23rd at approximately 4:00 P.M. This, of course, mooted the prayer for injunctive relief, but several months later Eastern Air Lines sought to reactivate its claim for damages resulting from the six-day work stoppage.

Upon motion by appellees, the trial court dismissed the complaint on the ground that the matters in controversy did not "arise under the constitution, laws or treaties of the United States."

In *Florida East Coast Railway Company v. Jacksonville Terminal Company*, 5 Cir. 1964, 328 F.2d 720, at 722, we stated the test of federal jurisdiction where it is asserted under the "federal question" section. We there quoted from *Dickson v. Edwards*, 5 Cir., 293 F.2d 211:

> "The test is the familiar one that it must appear from the complaint that the construction of a federal statute will have an adverse effect on the right of recovery if the statute is construed in one rather than another way."

We apply that test here.

Both parties to this litigation agree that the Railway Labor Act, 45 U.S.C.A. 151, et seq., prohibits self-help by employees and employers in rail carrier and air carrier fields under two well-known sets of circumstances. Not only is this true, but the courts have recognized that under either of these two sets of circumstances the anti-injunction prohibition of the Norris-LaGuardia Act is not applicable, and a strike by employees or a violation of the terms of the Act by the carrier, warrants the issuing of an injunction at the instance of the injured party. The two types of situations when injunctions are permissible are (1) where the compulsory adjustment procedures provided for in the Act are being pursued in connection with a "minor" dispute. *Brotherhood of Railway Trainmen v. Chicago R & I Ry. Co.*, 353 U.S. 30, and (2) where the National Mediation Board procedures, as provided in the Act, have not been concluded where a controversy involves a "major" dispute. *Elgin, Joliet and E. Railway v. Burley*, 325 U.S. 711.

Appellant does not here contend that the strike has anything to do with the "major" dispute that is pending between the parties by reason of the fact that a Section 6 notice has been given by the carrier for the negotiation of a new contract. Nevertheless, appellant does contend that the mere fact that such major dispute is now pending on the docket of the Mediation Board, a work stoppage by the employees is a violation of the Railway Labor Act. We think this contention is unsound since there is nothing in the Act itself that prohibits self-help except in the two circumstances which have been set out above. Thus, it cannot be said that a strike which is not in support of the position being maintained by the striking employees in either a minor or major dispute, as the case may be, is prohibited by the terms of the Act.

The Court of Appeals for the Second Circuit had such a problem in *Pan American World Airways v. Flight Engineers International Association*, 2 Cir., 306 F.2d 840. There, a strike occurred at a time when a major dispute was pending before the National Mediation Board but after the dispute *out of which the strike grew* had been finally disposed of by that Board. In other words, the Mediation Board had finally disposed of a dispute in a manner unsatisfactory to the Flight Engineers; during the thirty-day cooling off period Pan American World Airways had filed an additional Section 6 notice proposing a change in the existing agreement; thereafter the strike was called by the Association because of their dissatisfaction with the termination by the Mediation Board of the first dispute. The court held that the mere existence of a major dispute before the Mediation Board did not

cause the strike in protest to the earlier action to be an illegal strike in violation of the terms of the Act.

So, too, here, the fact that there is a negotiation pending on proposed changes in the agreement affecting conditions of employment does not make illegal a strike in protest to matters in no way related to the pending negotiations.

We find no other provision of the Railway Labor Act which expressly places in Eastern Airlines the right to bring an action in the Federal District Court to enjoin or seek damages for a breach of the employment contract, which Eastern alleges occurred when the appellees went out on strike on February 17th. Where Congress has sought to give such right in other labor management disputes, it has found means to do so as is indicated by Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C.A. § 185(a).

The relations between Eastern Airlines and its employees and their Association are fixed by contract. If a breach of this contract has occurred by the work stoppage on February 17th, presumably a cause of action exists in favor of Eastern Air Lines under normal, common-law principles. Likewise, if equity principles would warrant the granting of an injunction such a right would exist without reference to the Railway Labor Act. Such proceedings could be brought in the state courts. Lack of federal court jurisdiction does not weaken the right nor deny the remedy.

Appellant goes further here, however, and argues that the conduct of the defendants below interfered with its obligation to carry the United States mail, and constituted

an interference with interstate commerce, and thus the Federal court has jurisdiction because Eastern seeks to vindicate its right to continue to carry on these duties which it is under obligation to do under its certificate of public convenience and necessity. We find no authority for the proposition that the holder of such a certificate is under any obligation to vindicate the rights of the United States, either in seeing that the mails are carried without interference or that interstate commerce be not interfered with by filing a suit in a Federal District Court. Federal courts, under our system, have limited jurisdiction. The jurisdiction statutes do not embrace every action that may be brought by a person engaged in interstate commerce merely because the defendant in the action may be charged with conduct that in some way would amount to interference with the free flow of commerce. This, in effect, is what Eastern Air Lines seeks to have this court permit.

We conclude that since the Railway Labor Act does not expressly prohibit a strike under the circumstances that existed in this case, and since a recovery or denial of recovery for the breach of contract alleged here is in no-wise dependent upon an interpretation of the Railway Labor Act, the trial court was correct in its determination that federal question jurisdiction did not attach to this complaint.

The judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21312

D. C. Docket No. 10573-M-Civil-DD

EASTERN AIR LINES, INC.,

Appellant,

versus

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Eastern Air Lines, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 12, 1965

Issued as Mandate: Feb. 25 1965

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21312

EASTERN AIR LINES, INC.,

Appellant,

VS.

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING

(February 16, 1965)

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

FILED: FEB. 16 1965

EDWARD W. WADSWORTH
Clerk

Appendix A
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 10,573-M-Civil-DD

EASTERN AIR LINES, INC., a Delaware corporation,

Plaintiff,

vs.

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, *et al.,*

Defendants.

ORDER GRANTING MOTION TO DISMISS

Filed Dec. 9, 1963

This Cause came on to be heard for further argument on the Defendants' Motion to Dismiss the Complaint filed herein by the Plantiff, and the Court having heard argument of counsel and being otherwise fully advised in the premises, it is thereupon,

Ordered and Adjudged that the Court finds that there is no diversity of citizenship, and further that there is no Federal Question involved in this cause arising under the Railway Labor Act upon which to base this Court's jurisdiction, therefore, it is

Ordered, Adjudged and Decreed that this cause be, and the same hereby is dismissed for lack of jurisdiction.

Done and Ordered at Miami, Florida, this 6th day of December, 1963.

DAVID W. DYER,
United States District Judge.

APPENDIX B

Statutes Involved

Railway Labor Act:

"General Purposes

"Sec. 2. [*44 Stat. 577, as amended by 48 Stat. 1168, 45 U.S.C. 151a, 152*] The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretations or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

* * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party

to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representatives of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

"Functions of Mediation Board

"Sec. 5. [*44 Stat. 580, as amended by 48 Stat. 1195, 45 U.S.C. 155*] First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused."

TITLE II

"SEC. 201. [*Added by 49 Stat. 1189, 45 U.S.C. 181*] All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

"SEC. 202. [*Added by 49 Stat. 1189, 45 U.S.C. 182*] The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee,' respectively, in section 1 thereof.

"SEC. 203. [*Added by 49 Stat. 1189, 45 U.S.C. 183*] The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

"The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act."

Federal Aviation Act of 1958:

"Carrier's Duty to Provide Service, Rates, and Divisions

"Sec. 404. [*72 Stat. 760, 49 U.S.C. 1374*] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; . . .

"Postal Rules and Regulations

"Sec. 405. [*72 Stat. 760, 49 U.S.C. 1375*] . . .

* * * * *

"(d) From and after the issuance of any certificate authorizing the transportation of mail by aircraft, the Postmaster General shall tender mail to the holder thereof, to the extent required by the Postal Service, for transportation between the points named in such certificate for the transportation of mail, and such mail shall be transported by the air carrier holding such certificate in accordance with such rules, regulations, and requirements as may be promulgated by the Postmaster General under this section."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1016

EASTERN AIR LINES, INC., *Petitioner,*

v.

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's determination that it had no "federal question" jurisdiction under the Railway Labor Act, 45 U.S.C.A. sec. 151, *et seq.*, to award damages in an action by Eastern Air Lines, Inc. against a union com-

plaining of a "strike or work stoppage" which Eastern alleged did not arise out of a labor dispute between it and union under the Act.

STATEMENT OF THE CASE

Petitioner (sometimes hereinafter referred to as "Eastern") seeks a writ of certiorari to review the judgment of the Court of Appeals affirming an order of United States District Judge Dyer, Southern District of Florida, Miami Division, dismissing on federal jurisdictional grounds its complaint for damages allegedly caused by a "strike or work stoppage" by Eastern's flight engineers on February 17-23, 1961. The complaint joined as party defendants the Flight Engineers' International Association, the Eastern Chapter of the international union, one of the constituent units of the Chapter, and certain individual flight engineers (hereinafter referred to collectively as "Respondents" or "EAL Chapter.")[1] Damages of $900,000.00 per day were alleged, and injunctive relief was also sought.

On February 23, 1961, the "strike or work stoppage" terminated and, through the good offices of the then Secretary of Labor Arthur J. Goldberg, a back-to-work settlement was agreed upon. As part of the bargain, Eastern agreed not to take any disciplinary action against the flight engineers, and agreed to drop

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[1] Only two of these original defendants remain before the court, the EAL Chapter and the Miami Council of the EAL Chapter. The international union was never served with process, and the District Court dismissed the action against the individuals on the ground the complaint failed to state a claim against them upon which relief could be granted. With respect to the Miami Council, Respondents take the position the Council is not a suable entity nor amenable to judgment under federal law.

the pending litigation under circumstances EAL Chapter contends made the agreement a binding "accord and satisfaction."

Eastern honored this accord until June, 1962. Then, shortly after EAL Chapter instituted a strike against Eastern in protest against certain unfair labor practices, which strike is still in progress, Eastern reactivated the instant suit. Upon completion of the pretrial procedures, in October, 1963, EAL Chapter moved to dismiss the complaint on the following grounds, among others:

1. absence of "diversity of citizenship" jurisdiction;
2. absence of "federal question" jurisdiction; and
3. the dispute was within the exclusive jurisdiction of the grievance board established by the labor agreement, as mandated by Section 204 of the Act, 45 U.S.C.A. sec. 184.

Eastern's complaint had purported to ground federal court jurisdiction on both "diversity" and the existence of a "federal question" arising under the Railway Labor Act. However, with many of the flight engineers being residents of New York State or Florida, and thus co-citizens with Eastern, complete diversity was obviously lacking.

"Federal question" jurisdiction was similarly tenuous. Although the complaint sounded in Railway Labor Act violations, and even though Eastern had alleged its many contacts with federal law and regulation, the substance of the complaint appeared otherwise. The dispute giving rise to the "strike or work

stoppage" was alleged *not* to involve a labor dispute with Eastern under the Railway Labor Act. The complaint alleged that the object of the "strike or work stoppage" was *not* to obtain a new contract with Eastern, and was *not* to support a grievance under the old agreement. (R. 8, para. 19). Thus, neither a "major" dispute nor a "minor" dispute under the Act was involved. Rather, as alleged in the complaint, "this strike or work stoppage [was] in protest against the committee report concerning the United Air Lines representation dispute and [was] an effort to force the National Mediation Board to reject such report." (R. 7) The purpose of the "strike or work stoppage" was, Eastern alleged, "solely to make a public protest and demonstration concerning a dispute wholly unrelated to plaintiff and to bring pressure on the National Mediation Board." (R. 8)

EAL Chapter moved to dismiss for the reason that, on these allegations, whatever claim for damages Eastern might have, the claim rested solely on the contention the "public demonstration" was a breach of contract by the flight engineers not to strike, or was a tortious interference with Eastern's business. But, whether couched in contract or in tort terms, the essence of the claim was not federal law, and without this no "federal question" existed.

EAL Chapter's motion to dismiss was thoroughly briefed to United States District Judge Dyer. On November 18, 1963, Judge Dyer ruled Eastern had failed to establish complete diversity of citizenship upon which to base federal jurisdiction. The Court then set down for further oral argument the "existence of 'Federal Question' jurisdiction only."

Further oral argument was held on December 6, 1963. Judge Dyer then held "federal question" jurisdiction was also lacking, and dismissed the complaint. Judge Dyer never reached EAL Chapter's third objection to federal jurisdiction, namely that the dispute was within the exclusive jurisdiction of a grievance board. A ruling on that issue was pretermitted by dismissal of the complaint.

On appeal Eastern abandoned its claim that "diversity of citizenship" jurisdiction existed, and pressed only the "federal question" issue. In a "Reply Brief" filed with the Court shortly prior to argument, Eastern raised for the first time an argument it had neglected to present to the District Court. Eastern claimed, without having given the District Court an opportunity to pass upon the point, federal court jurisdiction could be founded also upon the doctrine of "pendent jurisdiction."

Only Eastern presented oral argument to the Court of Appeals. EAL Chapter rested its case on its briefs. On January 12, 1965, the Court of Appeals affirmed the dismissal of the complaint in a unanimous opinion written by Chief Judge Tuttle.

The Court of Appeals concluded that Eastern's damage claim was in "nowise dependent upon an interpretation of the Railway Labor Act." 340 F. 2d at 107. Instead, the Court held the relationships between Petitioner and Respondents "are fixed by contract." If any claim is presented by Eastern complaint, it is for "breach of contract," a matter outside the limited embrace of the Railway Labor Act. *Ibid.*

The Court found the Railway Labor Act of narrow scope, with "nothing in the Act itself that prohibits

self-help except in . . . two circumstances ["major" or "minor" disputes]." A strike in protest against the National Mediation Board was not, the Court held, within those matters governed by the Railway Labor Act. The Court stated:

> "Thus, it cannot be said that a strike which is not in support of the position being maintained by the striking employees in either a minor or major dispute, as the case may be, is prohibited by the terms of the Act." *Id.* at 106.

The Court found the silence of the statute dispositive in another respect. Congress, when it has sought to invest the federal courts with jurisdiction over breach of contract claims between employers and employees or their unions, "has found means to do so." This, the Court noted, Congress did do in enacting Section 301(a) of the Labor Management Relations Act, 1947, 29 U.S.C.A. sec. 185(a). This Congress did not do when it passed the Railway Labor Act.

> "We find no other provision of the Railway Labor Act which expressly places in Eastern Airlines the right to bring an action in the Federal District Court to enjoin or seek damages for a breach of the employment contract which Eastern alleges occurred when the appellees went out on strike on February 17th. Where Congress has sought to give such right in other labor management disputes, it has found means to do so as is indicated by Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C.A. § 185(a)." *Id.* at 106-107.

Finally, the Court below found nothing in the several nexuses between Eastern and other federal regulatory statutes to bring Eastern's complaint within the "limited jurisdiction" of the federal courts.

> "The jurisdiction statutes do not embrace every action that may be brought by a person engaged in interstate commerce merely because the defendant in the action may be charged with conduct that in some way would amount to interference with the free flow of commerce. This, in effect, is what Eastern Air Lines seeks to have this court permit." *Id.* at 107.

In sum, the Court concluded:

> "We conclude that since the Railway Labor Act does not expressly prohibit a strike under the circumstances that existed in this case, and since a recovery or denial of recovery for the breach of contract alleged here is in nowise dependent upon an interpretation of the Railway Labor Act, the trial court was correct in its determination that federal question jurisdiction did not attach to this complaint." *Ibid.*

Eastern's petition for rehearing was denied on February 25, 1965.

REASONS FOR DENYING THE WRIT

In its petition Eastern buries in a surfeit of cases alleged to be in conflict with the judgment below a fact of overriding significance: The instant case is *sui generis.* It is unique on its facts and one of first impression in the Courts below. Counsel for Respondents can find no other suit like it under the Railway Labor Act in any federal court, and certainly Eastern points to none.

The typical case arising under the Railway Labor Act is one easily labelled "major" dispute or "minor" dispute, as those expressions of art are used by the courts in describing controversies under the Act be-

tween management and labor. The instant case, as alleged in the complaint, was neither of these, however. It was not one growing out of a dispute for a new collective bargaining agreement, nor was it a case which involved a dispute over the interpretation or application of an old agreement. The dispute did not even involve Eastern, or what Eastern had or had not done. The only complaint the flight engineers had, and as alleged in the complaint the triggering event for the "strike or work stoppage," was the class or craft decision of the National Mediation Board in the United Air Lines case.

Notwithstanding Eastern's undocumented suggestions to the contrary, an unfortunate attempt to influence the Court's view of the importance of this singular case, there is not a shred of evidence to support the charge that the "strike or work stoppage" was a device, or a cover, or a camouflage, actually designed to force Eastern to capitulate in a "major" or "minor" dispute. Whatever may be said of a case wherein a strike is "ostensibly" called for one purpose, but is truly perpetrated to accomplish another, that is not the instant case. Eastern knows this, its complaint alleges this, and Eastern is bound by this. This Court should leave to another day, and to another case, the opportunity to resolve "federal question" jurisdiction under those circumstances.

The two reasons given by Eastern to support the writ, a conflict between decisions and the general importance of this case, fall when the uniqueness of this case is recognized.

The decisions cited by Eastern (Pet. 16-17, 21) for the proposition that other courts have held that "fed-

eral question" jurisdiction is stated on its complaint are all clearly inapposite and present no conflict. No one quarrels, including the Court below, with the holding in those cases that the federal courts may enjoin strikes under the Railway Labor Act under certain circumstances.[2] The Court below specifically stated:

> "Both parties to this litigation agree that the Railway Labor Act, 45 U.S.C.A. § 151 et seq., prohibits self-help by employees and employers in rail carrier and air carrier fields under two well-known sets of circumstances. Not only is this true, but the courts have recognized that under either of these two sets of circumstances the anti-injunction prohibition of the Norris-LaGuardia Act is not applicable, and a strike by employees or a violation of the terms of the Act by the carrier, warrants the issuing of an injunction at the instance of the injured party." 340 F. 2d at 106.

However, the Court below also quite properly recognized this did not answer the "federal question" jurisdiction issue over Eastern's damage claim; rather, it merely raises the issue.[3]

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[2] The value of these "conflicting" decisions as precedents is lessened by the fact that some were on *ex parte* motions for preliminary relief and it does not even appear the jurisdictional issues were litigated. The exception is *Brotherhood of Railroad Trainmen* v. *N.Y. Central R.R.*, 246 F. 2d 114 (6th Cir. 1957). Respondents respectfully suggest Judge, now Justice, Stewart's dissent represents the correct view of the jurisdictional issue in that case.

[3] Eastern also claimed below that if the federal court had jurisdiction to enjoin the strike, jurisdiction to award damages must also obtain. This, of course, begs the question of the jurisdiction of the District Court to enjoin the strike herein, a matter never litigated in the District Court during the injunctive proceedings in February, 1961. *Bell* v. *Hood*, 71 F. Supp. 813 (S.D. Calif. 1947), discussed *infra* p. 15, is one of many cases opposed to Eastern's position. Eastern has abandoned this contention before this Court.

The Court of Appeals read the Railway Labor Act as being less than an all-pervasive statute and less than totally preemptive of the field of disputes between employees and anyone else, including government agencies. Eastern is critical of this reading and cites the decisions of this Court in *International Association of Machinists* v. *Central Airlines,* 372 U.S. 682 (1963) and *Republic Steel Corp.* v. *Maddox,* —— U.S. —, 85 Sup. Ct. 614 (Jan. 25, 1965), as commanding that the Act must not be construed to leave a "hiatus" in the application and interpretation of the statute.

Eastern's contention is misplaced and the cases cited are inapposite and present no conflict. To argue, as Eastern does, that the Act must be read expansively evinces less than complete understanding of our federal system and the "essentially incomplete and interstitial nature of federal law."[4] The Court below was quite correct in its view of the scope of the Act. Our federal system is founded upon a grant of limited powers to the national government, with Article III of the Constitution carving out only limited jurisdiction for the federal courts. The Court of Appeals properly held Congress, in exercising its limited powers, has chosen not to regulate the conduct complained of here by Eastern. *Cf. Huron Cement Co.* v. *City of Detroit,* 362 U.S. 440, 444-445 (1960).

In this instance as in many others Congress, fully appreciative of the resulting diversity and "medley of attitudes," *Retail Clerks International Association, Local 1625* v. *Schermerhorn,* 375 U.S. 96, 104-105 (1963), has left to the states and their courts regula-

[4] Hart, *The Relations Between State and Federal Law,* 54 Col. L. Rev. 489, 525 (1954).

tion of the conduct in question. This non-uniformity is the essence and strength of our federalism. It is inherent in the law, especially in the transportation industry.[5] Eastern may claim the results absurd, but there can be no quarrel that such diversity exists in in our federal system.

The judgment below is not out of the mainstream of judicial opinion on "federal court" jurisdiction, nor does it represent an exceptional view of Congressional regulation of labor relation matters. *N.L.R.B.* v. *International Longshoremen's Association,* 332 F. 2d 992 (4th Cir. 1964), confirms that Congress has not yet chosen to exercise the panoply of its regulatory authority over labor matters affecting commerce. In that case, just as here, the Court found federal law did not regulate the alleged "labor dispute" arising out of a refusal to work. The Court rejected "the notion that whenever a union calls a work stoppage or refuses to supply labor there is a 'labor dispute.'" *Id.* at 996. The Court concluded that what was actually involved, by the union's refusal to load ships of an owner of vessels trading with Cuba during the "Missile Crisis," was a dispute "political in nature." *Id.* at 995. The opinion below herein is to a similar effect in its definition of conduct proscribed by the Railway Labor Act.

Maddox and *Central Airlines* are not in conflict with the judgment below, and they compel no different re-

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[5] For example, many states have different and oft-times conflicting "full crew" laws for trains passing through their states. See *Missouri Pacific R.R.* v. *Norwood,* 283 U.S. 249 (1931). Similarly, an interstate air carrier's employment practices may be lawful in one state, but discriminatory in another. See *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines,* 372 U.S. 714 (1963).

sult. *Maddox* was a Labor Management Relations Act suit involving the application of Section 301 of that Act, the very section the Court below herein found absent from the Railway Labor Act and from this case. In *Maddox,* the action had been prosecuted in the state courts; it did not involve, and could not have involved, the "federal question" jurisdiction of the federal courts, the sole issue herein. Finally, there is nothing in *Maddox,* a wrongful discharge case by an employee against his employer, which even remotely suggests the federal courts have jurisdiction under the Railway Labor Act to award damages to an employer for losses sustained by a "public demonstration" against the National Mediation Board.

Central Airlines is equally inapt. The twin pillars of that decision, a specific duty mandated by the Railway Labor Act which has been abrogated and a strong federal interest in uniformity of enforcement of arbitration awards under the Act, are absent here. The suit by the union in that case to enforce a favorable award was not grounded on a claim of contract violation or tort injury, as here. The union there was seeking to enforce a duty specifically imposed by Section 204 of the Act, 45 U.S.C.A. sec. 184, the duty to establish a grievance board to resolve "minor" disputes. No proscription, implicit or explicit, is found in the Act governing "public demonstrations" of the character involved herein. The Act is silent on the matter of duties and rights under the instant unique circumstances.[6]

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[6] Cases relied upon by this Court in *Central Airlines,* and cited by Eastern (Pet. 14), *Virginian Ry.* and *Steele,* are also not in point for they too involve circumstances wherein the Court could properly determine the Railway Labor Act stated certain duties, which duties had been abrogated.

The other support for *Central Airlines,* avoidance of multiple state court enforcement of federally "compelled arbitration," is also missing here. The serious conflicts-of-law problems referred to by the Court in *Central Airlines,* problems suggested by the Brief for Petitioners in that case at p. 33, n. 24, are not presented here. Likewise, with respect to the evil of several state courts asserting jurisdiction and rendering conflicting judgments. Here, unlike in *Central Airlines,* there can be only one plaintiff, the employer, seeking damages. Just as clearly only one state jurisdiction will be invoked, the state wherein the union treasury is situated. "Forum shopping" among the states will not, as a practical matter, occur here.

The remaining ground asserted by Eastern to support the writ, an alleged conflict between decisions on the doctrine of "pendent jurisdiction," flounders on Eastern's misunderstanding of the effect of the exercise of judicial power in the first instance and on Eastern's misstatement of the doctrine itself.[7]

Eastern labors under the misapprehension that a federal court, by deciding it has no "federal question" jurisdiction under a federal statute, thereby determines a "federal question" which, *ipso facto,* establishes federal court jurisdiction. Pet. 9-10, 23-24. If this were so, of course, "federal question" jurisdiction would be unlimited, and federal court jurisdiction

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[7] No good reason appears why, Eastern having failed to present its "pendent jurisdiction" claim to the District Court for consideration, and the Court of Appeals having disposed of it *sub silentio,* this Court should accord the contention any weight whatsoever in its own consideration of the petition. Nevertheless, because the Court may wish to have Respondents' views on the contention, they are set forth for the Court's convenience.

under Article III of the Constitution would be all-embracing, rather than limited as now.

It must be admitted that a court has

> "a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person or a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration." *Stoll* v. *Gottlieb*, 305 U.S. 165, 171 (1938).

But, while the Courts must have this power, and

> "While every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist . . . exercise of this power cannot create additional jurisdiction." *Green* v. *Obergfell*, 121 F. 2d 46, 54-55 (D.C. Cir.), *cert. denied*, 314 U.S. 637 (1941).

Thus, the District Court and the Court of Appeals did not, by deciding the jurisdictional issue that Eastern's claim did not "arise under the Railway Labor Act," thereby determine a "federal question" which establishes federal jurisdiction. It follows necessarily that the District Court also did not thereby acquire jurisdiction to decide the merits of Eastern's claim under the doctrine of "pendent jurisdiction." It would be sheer "bootstrap" if it were otherwise.

However, assuming *arguendo* that the District Court did somehow decide a "federal question" sufficient to establish its jurisdiction when it determined "federal question" jurisdiction did not exist, application of the "pendent jurisdiction" doctrine here falters for yet another reason. To enable the federal courts to de-

cide a "non-federal" ground, the Supreme Court held in *Hurn* v. *Oursler,* 289 U.S. 238 (1933), that ground must be joined with a "federal" ground in support of a single cause of action. This Court has never held, as Eastern contends, that where two distinct and separate causes of action are presented, one a "federal claim" and the other a "state claim," the federal courts have jurisdiction to determine the state claim. In fact, in *Hurn*, this Court held precisely to the contrary, stating that the separate and distinct state claim is "entirely outside the federal jurisdiction and subject to dismissal at any stage of the case." 289 U.S. at 245-246.

At best, Eastern can claim only the instant case involves two different remedies, one for injunctive relief and the other for damages. But damages, unlike "grounds" to support a claim, are not "facts" stated to show a violation of law any more than an injunction is. They both are a form of relief or a remedy. The request for one does not support the exercise of jurisdiction over the other under the doctrine of "pendent jurisdiction."

Bell v. *Hood*, 71 F. Supp. 813 (S.D. Calif. 1947), on remand from 327 U.S. 678 (1946), disposes completely of Eastern's argument that the District Court had "pendent jurisdiction" to decide Eastern's "non-federal" damage claim. In *Bell,* the plaintiffs argued that under the rule of *Hurn,* the District Court must retain jurisdiction to determine the "non-federal" claim, "namely, the cause of action for damages under California law." 71 F. Supp. at 819. This argument was rejected, in the following terms:

> "If the complaint alleged a 'federal cause of action' and a 'state cause of action' so identical as to

be a really only two different grounds in support of a single cause of action, then the rule of Hurn v. Oursler would apply, and this court would hear and determine the state cause of action in order to dispose of the entire controversy. But the federal cause of action is entirely wanting in the complaint at bar.

"'Where, as here, neither the constitutional provision nor any act of Congress affords a remedy to any person, the mere assertion by a plaintiff that he is entitled to such a remedy' *does not constitute a federal cause of action.* Cf. Bell v. Hood, supra, 327 U.S. at 685-686, 66 S.Ct. 778, 90 L.Ed. 939.

". . . Being of the opinion that neither the Constitution nor the statutes of the United States give rise to any cause of action in favor of plaintiffs upon the facts alleged, I hold that federal courts cannot now grant such recovery. Nor does any other ground appear upon which relief can be granted to plaintiffs in this court." 71 F. Supp. at 820.

Eastern's similar contention is without merit for the same reasons.

Eastern's petition presents no good reason to support the writ. The instant case is one unto itself. The rule of law established by the Court of Appeals is of limited application because of the uniqueness of the factual context. The judgment of the Court below, far from being in conflict with decisions of this Court or other Courts of Appeals, conforms to judicial opinion that Congress has not yet chosen to preempt regulation of all labor affairs affecting commerce.

Eastern, in effect, is asking this Court to amend the Railway Labor Act to encompass the present dispute.

The Court of Appeals committed no error by refusing to accept this new role. Nor did the Court err when, after applying the familiar test of determining "federal question" jurisdiction, it found Eastern's losses, if any, did not stem from any violation of the Railway Labor Act. The Court below correctly held these alleged losses resulted instead from a violation of some "normal, common-law principles," if at all, within the jurisdiction of the Florida state courts. 340 F. 2d at 107. *Accord, Consolidated Freightways, Inc.* v. *United Truck Lines, Inc.*, 216 F. 2d 543 (9th Cir. 1954), *cert. denied*, 349 U.S. 905 (1955); *Downing* v. *Howard*, 69 F. Supp. 6 (D. Dela. 1946), *aff'd on other grounds*, 162 F. 2d 654 (7th Cir. 1947); *Crawford* v. *Pituch*, 91 F. Supp. 626 (W.D. Pa. 1950).

CONCLUSION

The petition fails to disclose any matter or ground why the cause should be reviewed by this Court. Accordingly, the petition should be denied.

Respectfully submitted,

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Section 2, Ninth	2, 8
Section 3	5
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Miscellaneous:

In the Matter of Representation of Employees of the United Air Lines, Inc., File No. C-2946 (1961), 3 Determination of Craft or Class of the National Mediation Board	2

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 64

EASTERN AIR LINES, INC., PETITIONER

v.

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of May 17, 1965, inviting the Solicitor General to express the views of the United States with respect to this case.

STATEMENT

Petitioner, a carrier by air within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. 181, brought this action in the district court against the

then-certified collective bargaining representative of its flight engineer employees to enjoin, and for damages allegedly caused by, a strike which the Union had called against petitioner. The complaint charged that the strike, which lasted from February 17 to February 23, 1961, violated both the Railway Labor Act and the collective bargaining agreement between the parties (Pet. App. 30-31). It alleged that the strike had no connection with any dispute between the union and petitioner, but was to protest the report of a committee appointed by the National Mediation Board to resolve a craft dispute on another airline (Pet. App. 30);[1] that it was part of a general strike against all major airlines by employees represented by the Flight Engineers in an attempt to put pressure upon the Board to reject the recommendations of the committee (*ibid.*); that, at the time of the strike, the parties were bargaining with respect to a new con-

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[1] Under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. 152, Ninth, the National Mediation Board may itself designate who shall participate in an election to resolve representation disputes, or it may appoint a committee of three neutral persons to make the designation. The dispute giving rise to the strike at Eastern Air Lines was between the United Air Lines Chapter of the Flight Engineers' International Association and the Air Line Pilots Association over whether pilots and flight engineers on United constituted a single craft or two crafts. The Board appointed a committee of neutrals which, after hearings and investigation, held that such pilots and flight engineers constituted a single craft. *In the Matter of Representation of Employees of the United Air Lines, Inc.*, File No. C-2946 (1961), 3 Determination of Craft or Class of the National Mediation Board, p. 56. See *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905 (C.A.D.C.), certiorari denied, 368 U.S. 956.

tract (Pet. App. 30-31); that the dispute over the new contract had been docketed before the Board as a so-called "major dispute" within the meaning of Sections 5, First and 6 of the Railway Labor Act, 45 U.S.C. 155, First and 156 (Pet. App. 31); and that the strike was totally unrelated to such dispute (Pet. App. 31).

Petitioner's complaint was filed at the beginning of the strike, and sought injunctive relief as well as compensatory and punitive damages (Pet. App. 31). The termination of the strike rendered the claim for injunctive relief moot, and the litigation proceeded as a claim for damages (Pet. App. 31).

The district court, holding that diversity of citizenship was lacking and that petitioner had failed to allege a cause of action under the Railway Labor Act, dismissed the complaint for lack of jurisdiction (Pet. App. 39-40). The court of appeals affirmed. It discussed but rejected three possible bases for federal jurisdiction.

First, the court held that the Railway Labor Act itself does not render the strike unlawful (Pet. App. 32-34). The court stated that the Act prohibits strikes only (Pet. App. 32):

> (1) where the compulsory adjustment procedures provided for in the Act are being pursued in connection with a "minor" dispute * * * and (2) where the National Mediation Board procedures, as provided in the Act, have not been concluded where a controversy involves a "major" dispute.

It ruled that since the strike here had no connection with either a minor or major dispute—since it did not

relate to the dispute between Eastern and the Union then pending before the National Mediation Board—the Act did not bar it (Pet. App. 33).

Second, with regard to the allegation that the strike violated the collective bargaining agreement, the court held that, unlike Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185(a), the Railway Labor Act does not give the federal courts jurisdiction over suits based upon violations of collective bargaining agreements between persons subject to the latter Act (Pet. App. 34).

Third, the court held that petitioner's allegation that the strike interfered with its obligation to carry the United States mail, constituted an interference with interstate commerce, and prevented petitioner from carrying out its duties under its certificate of public convenience and necessity, furnished no basis for federal court jurisdiction (Pet. App. 34-35).

DISCUSSION

1. The principal question is whether, during the period in which the mediatory machinery of the Railway Labor Act is being utilized in an attempt to settle a "major" dispute between a carrier and its employees, the Act bars the employees from striking over an unrelated dispute that is not subject to the Act's mediatory provisions. If the Act does prohibit such a strike, the federal courts have jurisdiction to grant appropriate relief to correct the statutory violations. See *Texas & N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548; *Virginian Ry.* v. *Federation*, 300 U.S. 515; *Tunstall* v.

Brotherhood, 323 U.S. 210, 213; *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 235, 238; *Railroad Trainmen* v. *Howard*, 343 U.S. 768; *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 41-42; *Machinists* v. *Central Airlines*, 372 U.S. 682, 690. (We discuss below, pp. 11-13, the question whether in such circumstances the appropriate relief may include damages as well as an injunction.)

As this Court has noted, the chief purpose of the Railway Labor Act was to prevent strikes and the resulting disruption of the national transportation system. *Texas & N.O.R. Co.* v. *Ry. Clerks*, *supra*, 281 U.S. at 561-566; *Virginian Ry.* v. *Federation*, *supra*, 300 U.S. at 542-543, 545-547, 553; *Slocum* v. *Delaware, L. & W.R. Co.*, 339 U.S. 239, 242; *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 611; *Machinists* v. *Central Airlines*, *supra*, 372 U.S. at 687. To achieve this purpose, Congress established machinery for the handling of three categories of disputes which had been productive of strikes, and imposed certain limitations on the right to strike while that machinery was being utilized.

a. The determination of so-called "minor" disputes between employees and a carrier, *i.e.*, those growing out of grievances or out of the interpretation or application of collective bargaining agreements, is covered by Sections 3 and 204 of the Act, 45 U.S.C. 153 and 184. Congress provided for negotiation and, if negotion is unsuccessful, for compulsory arbitration by various adjustment boards. While the Act does not expressly forbid strikes over these minor disputes, this Court held in *Trainmen* v. *Chicago R. & I. R. Co.*,

supra, 353 U.S. 30, that it bars a strike over minor disputes which have been submitted, as the statute requires, to the appropriate adjustment board.

b. Congress provided a more detailed procedure for the resolution of so-called "major" disputes between a carrier and its employees, which concern changes in pay, rules or working conditions, as well as of "any other dispute not referable to" the appropriate adjustment board.[2] These disputes are to be resolved through a process which first includes conferences; then, if conferences are unsuccessful, mediation by the National Mediation Board; next, if mediation fails, a request by the Board that the parties submit to binding arbitration; and finally, if such request is rejected and the Board believes that the dispute threatens substantially "to deprive any section of the country of essential transportation service," the appointment by the President of an emergency board which is to investigate the dispute and make a report thereon to the President within 30 days. The statute provides that, after the creation of such Board and for 30 days after it has made its report, the parties to the controversy shall make "no change, except by agreement * * * in the conditions out of which the dispute arose" (Section 10, 45 U.S.C. 160). A strike would seem to be a "change * * * in the conditions out of which the dispute arose," and therefore specifically prohibited during the period specified. It would further seem that the statutory prohibition upon the

[2] Sections 5, First (b) and 203(b) of the Railway Labor Act, 45 U.S.C. 155, First (b) and 183(b).

right to strike is not limited to that period, but applies as long as any of the procedures for the resolution of a major dispute is being employed. Although this Court has not directly decided the question, it stated in *Elgin, J. and E.R. Co.* v. *Burley*, 325 U.S. 711, 725:

> The parties are required to submit to the successive procedures designed to induce agreement. * * * But compulsions go only *to insure that those procedures are exhausted before resort can be had to self-help* [emphasis supplied].

See also, *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284, 290-291.[3] But once the statutory machinery has been exhausted, the employees may strike, and the Norris-LaGuardia Act prohibits a federal court from enjoining such a strike. *Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50; *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330;[4] *Locomotive Engineers* v. *B. & O.R. Co.*, 372 U.S. 284.

c. The third type of controversy that Congress believed was productive of strikes was disputes among

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[3] See also, *Norfolk & P.B.L. R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. 2d 34, 39, 42, 45 (C.A. 4), certiorari denied, 355 U.S. 914; *Chicago, Rock Island & Pacific R. Co.* v. *Switchmen's Union*, 292 F. 2d 61, 66 (C.A. 2); *Pan American World Airways* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 840, 846 (C.A. 2).

[4] In the *Telegraphers* case the procedures of the Railway Labor Act had been exhausted. See 362 U.S. at 349-350 (dissenting opinion of Mr. Justice Whittaker). Compare *Florida E.C. Ry. Co.* v. *Brotherhood of R.R. Trainmen*, 336 F. 2d 172, 181-182 (C.A. 5), certiorari denied, 379 U.S. 990, followed in *Florida E.C.R.* v. *United States*, C.A. 5, No. 22134, decided July 21, 1965.

employees over the selection of their representative and over the craft lines along which they should organize. See *Virginian Ry.* v. *Federation, supra*, 300 U.S. at 545.[5] In Section 2, Ninth, 45 U.S.C. 152, Ninth, Congress directed the National Mediation Board to resolve representation disputes, to determine (either itself or through committees which it appointed) the crafts in which representation elections should be held, and to certify the representative to the carrier. The Act compels the carrier to bargain with the certified representative. Although the Act is silent as to whether a strike over a representation dispute is permissible during the period when the Board is considering the dispute, the same considerations which led this Court to conclude that the Act prohibits strikes over major and minor disputes while Board procedures are being utilized would seem applicable to representation disputes, and to require the same negative conclusion.

In sum, in the Railway Labor Act Congress attempted to prevent strikes and the resulting interruptions to the nation's transportation facilities by providing comprehensive procedures to resolve disputes between carriers and their employees and among

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[5] The Court there noted:

> Experience had shown, before the amendment of 1934, that when there was no dispute as to the organizations authorized to represent the employees, and when there was willingness of the employer to meet such representative for a discussion of their grievances, amicable adjustment of differences had generally followed and strikes had been avoided.

the employees themselves. As to certain types of disputes, the statutory procedures provide for a final binding resolution. As to other types, they provide the machinery by which the parties can settle the dispute, and to facilitate such settlement the Act bars strikes until such procedures have been exhausted.

In support of petitioner's position, it can be argued that the congressional plan to bar the use of strikes during the period when the machinery of the Board is being utilized requires the prohibition of all strikes against the carrier during that period, and not just those arising out of the particular dispute then before the Board. The National Mediation Board has advised that it believes that permitting employees to strike over another dispute at a time when a major dispute to which such employees are parties is going through the negotiation and mediation procedures of the Railway Labor Act, would lessen the likelihood of the parties resolving the major dispute. For the Board, on the basis of its many years of experience in the field, believes that the threat of a strike if negotiation or mediation fails is an important inducement to the parties to settle their differences. Thus, allowing employees to strike about a dispute over which the Board has no jurisdiction while the Board is attempting to mediate a major dispute would tend to thwart the basic congressional plan of substituting negotiation and mediation for self-help in the resolution of labor disputes involving rail and air carriers.

On the other hand, the fact that Congress has not attempted to give the Board jurisdiction over all labor

disputes in the rail and air transportation industry,[6] might indicate that in disputes not subject to the Railway Labor Act Congress intended to place no similar restrictions upon the weapons available to the parties. The Act does not explicitly deny the right to strike during the period that the Board's processes are being utilized, but has been interpreted to do so implicitly because such limitation was deemed necessary to make effective the mediatory machinery that Congress provided. In these circumstances, the strong federal policy against the use of injunctions in labor disputes reflected in the Norris-LaGuardia Act would seem to suggest that Congress intended to permit employees to continue to use the strike as an economic weapon except in the three categories of disputes over which the Board has jurisdiction. This view is further supported by the words of the statute. The only language which relates to strikes is the provision in Section 10 (45 U.S.C. 160) that, during the period from the creation of a Presidential Emergency Board in a major dispute to 30 days after it has made its report to the President, "no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." Since this provision merely prohibits a strike with respect to the dispute before the Presidential Board, it

[6] The Board, for example, had no jurisdiction over the strike in the present case which the Flight Engineers called against Eastern because of the Committee's ruling in a case involving another carrier (United), in an alleged attempt to put pressure on the Board to reject that ruling.

would seem that Congress merely froze that dispute but did not prohibit during that period other strikes which grew out of other disputes.

While the United States is not now prepared to state its views on the merits, we believe that the question is an important one in the administration of the Railway Labor Act which warrants resolution by this Court. The fact, which respondents stress (Brief in Opp. 7-8), that this apparently is the first court case on the issue is not necessarily an accurate barometer of the importance of the question. The application of current and future developments in the field of automation to the railroad industry is likely to result in substantial changes in work allocations and labor requirements, and disputes between employees and carriers over the method for effectuating such changes are bound to occur. The decision below, by denying the federal courts jurisdiction to act with respect to a strike on one carrier called to support the union in its dispute with another carrier, would be likely to have a substantial impact upon the resolution of major labor disputes.

2. A second question is whether, if the Act prohibits a carrier's employees from striking at all during the period that the Board has a major dispute under consideration, the relief which the federal courts may grant against such violation includes the award of damages as well as an injunction. In the present case, the strike has long since ended, and the only controversy in this case between the parties involves Eastern's claim for compensatory and punitive damages.

The theory upon which federal courts have jurisdiction to enjoin a strike arising out of a labor dispute that is subject to the mediatory machinery of the Railway Labor Act is that Congress, by creating such machinery, impliedly modified the Norris-LaGuardia Act's prohibition upon the issuance of injunctions in labor disputes for the relatively brief period during which the Board's machinery is being used. To the extent that the Railway Labor Act does not prohibit particular types of strikes, Norris-LaGuardia would bar a district court from enjoining them. But Norris-LaGuardia does not prohibit an award of damages. It provides that "[n]o court of the United States * * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute * * *" (Section 1, 29 U.S.C. 101); the inhibitory effect which the possibility of a damage award might have upon the exercise of the employees' right to strike does not bring such an award within the prohibition. Where the requirements of the Railway Labor Act that are designed to protect individual rights have been violated, this Court has held that the federal courts may provide redress by way of damages as well as injunction. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood*, 323 U.S. 210. The present case, however, does not involve the deprivation of individual rights, and the theory upon which any violation of the Railway Labor Act would rest is the need to prevent strikes in order to make the mediatory processes of the National Mediation Board more effective. In such circumstances, it may be that an injunctive remedy alone is appropriate.

Cf. *Louisville & N.R. Co.* v. *Brown*, 252 F. 2d 149, 154-155 (C.A. 5), certiorari denied, 356 U.S. 949; *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366, 372, n. 7 (C.A. 2), certiorari denied, 375 U.S. 830.

This question, like the first one, is also difficult. It is important, however, and in view of the close relationship between the two questions, we believe that if the Court undertakes to decide the first one, it should also resolve this one.

3. The third question is whether, if the Union's strike did not violate the Railway Labor Act and the federal courts therefore correctly held that they have no jurisdiction over the carrier's claims based on such violation, they have jurisdiction over the claim for damages based on the Union's alleged breach of the collective bargaining agreement. There is nothing in the Railway Labor Act comparable to the grant of jurisdiction in Section 301 of the Labor-Management Relations Act (29 U.S.C. 185) to the federal courts to entertain suits between employers and unions for breach of contract, and the issue is whether the general scheme of the Railway Labor Act warrants implying such jurisdiction. The answer depends to a considerable extent on the issues of the scope of the Act, which we have urged warrant resolution by this Court. See *Machinists* v. *Central Airlines*, 372 U.S. 682; *Republic Steel* v. *Maddox*, 379 U.S. 650. This issue, however, is quite distinct from the others, and at this time we cannot state that it is of sufficient importance in the administration of the Act to warrant resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented which, we believe, comprehends the issues discussed in points 1 and 2 of this memorandum.

Respectfully submitted,

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AUGUST, 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 783613 102

Office-Supreme Court, U.S.
FILED
SEP 9 1965
JOHN F. DAVIS, CLERK

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 64

EASTERN AIR LINES, INC.,

Petitioner,

—v.—

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION *et al.*,

Respondents.

REPLY OF EASTERN AIR LINES, INC. TO MEMORANDUM FOR THE UNITED STATES

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FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION *et al.*,

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REPLY OF EASTERN AIR LINES, INC. TO MEMORANDUM FOR THE UNITED STATES

Eastern Air Lines, Inc. (Eastern) respectfully submits this reply to the memorandum which was filed by the Solicitor General on behalf of the United States pursuant to this Court's Order of May 17, 1965 inviting such a memorandum.

The Solicitor General has advanced succinctly and forcefully reasons why Eastern's petition for a writ of certiorari should be granted insofar as it seeks a ruling that the strike called by defendants in February 1961 was a violation of the Railway Labor Act as to which a federal court has jurisdiction to grant injunctive relief and damages. The Solicitor General takes no position on the merits of the question whether the strike—called because of a dispute to which Eastern was not a party—violated the Railway Labor Act. However, in support of Eastern's position that the Act was violated, the Solicitor General calls attention (Memorandum p. 5) to the fact that "the chief purpose of

the Railway Labor Act was to prevent strikes and the resulting disruption of the national transportation system", and states (Memorandum p. 9) the position of the National Mediation Board "that permitting employees to strike over another dispute at a time when a major dispute to which such employees are parties is going through the negotiation and mediation procedures of the Railway Labor Act, would lessen the likelihood of the parties resolving the major dispute", and that "allowing employees to strike about a dispute over which the Board has no jurisdiction while the Board is attempting to mediate a major dispute would tend to thwart the basic congressional plan of substituting negotiation and mediation for self-help in the resolution of labor disputes involving rail and air carriers." These factors give strong implicit support to Eastern's contention that the strike violated the Railway Labor Act.

We wish to re-emphasize the following two factors which we think even more strongly, and explicitly, demonstrate that the strike was unlawful:

(1) The *first* duty imposed by the Act on carriers and employees is (Section 2, First) "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . .". Clearly, the disruption of negotiations, mediation and the contractual employment relationship by calling an irresponsible strike over an extraneous issue is a violation of that statutory duty—both as to *making* and *maintaining* agreements. The plain statutory requirement "cannot be rendered nugatory" by denial of the judicial relief necessary to enforce it. *Virginian Railway* v. *System Federation No. 40,* 300 U. S. 515 (1937) and *Railroad Trainmen* v. *Chicago River & I.R.R.,* 353 U. S. 30 (1957).

(2) Section 5 of the Act specifically gives the National Mediation Board jurisdiction of "any labor emergency"

and "any . . . dispute not referable to" the Adjustment Board. Certainly, the strike called by defendants created a "labor emergency" and it involves a "dispute not referable to" any Adjustment Board. Thus, contrary to the suggestion of the Solicitor General (*e.g.*, Memorandum p. 10, ftn. 6), the Board had jurisdiction to "proffer its services" and seek a solution of the "labor emergency", and upon intervention by the Board Section 5 of the Act requires that "no change shall be made in . . . established practices in effect prior to the time the dispute arose." A strike over a foreign issue plainly is a change in "established practices" in effect before the strike.* Since, as the Solicitor General correctly states (Memorandum pp. 6-7), federal judicial power may be exerted to prevent strikes during Emergency Board proceedings, it may equally be used to prevent the conduct of defendants here involved.

For the foregoing additional reasons, as well as others stated in our petition for writ of certiorari, we believe the Solicitor General has properly recommended that the writ be issued by this Court.

We also concur emphatically with the Solicitor General's statement (Memorandum p. 8):

> "Although the Act is silent as to whether a strike over a representation dispute is permissible during the period when the Board is considering the dispute, the

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* We must respectfully disagree with the Solicitor General's statement (Memorandum p. 10) that "The only language which relates to strikes is the provision in Section 10 (45 U. S. C. 160) that, during the period from the creation of a Presidential Emergency Board in a major dispute to 30 days after it has made its report to the President, 'no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose' ". We think that the language of Section 5 even more clearly prohibits a strike during National Mediation Board mediatory efforts and, unlike the language of Section 10, the prohibition extends to changes in "established practices" —not merely "the conditions out of which the dispute arose."

> same considerations which led this Court to conclude that the Act prohibits strikes over major and minor disputes while Board procedures are being utilized would seem applicable to representation disputes, and to require the same negative conclusion."

We submit that, for the same reasons, the strike against Eastern—which was called "to force the National Mediation Board" to change the representation decision reached in the dispute at United Air Lines (R. 7, 9)—was violative of the Act and therefore subject to the jurisdiction of a federal court.

We urge that the writ not be limited in the manner suggested by the Solicitor General, as such limitation would disable the Court from following to their logical conclusion the rulings in *Machinists* v. *Central Airlines*, 372 U. S. 682 (1963) and *Republic Steel Corp.* v. *Charlie Maddox*, 379 U. S. 650 (1965). In those cases, the Court held that "substantive federal law applies to suits on collective bargaining agreements covered by §204 of the Railway Labor Act." We believe that the same principle requires the federal court to take jurisdiction to decide whether Eastern's contract with defendants under the Railway Labor Act was violated by the strike in February 1961. Since, as the Solicitor General and the National Mediation Board say (Memorandum p. 9), the union conduct here involved "would tend to thwart the basic congressional plan of substituting negotiation and mediation for self-help in the resolution of labor disputes involving rail and air carriers", we submit that the Court should issue the writ of certiorari in a form which would permit deterrence of such conduct upon the basis of a federal court ruling that the contract (required by and negotiated pursuant to federal law) has been violated. We respectfully submit

that the issue as to availability of such a deterrent is as important as the issue of deterrence through a finding of Railway Labor Act violation. If, as the Mediation Board says, the conduct of the defendants thwarts the purpose of the Act, the Court should not disable itself from providing any remedy which may be available.

For the same reasons, we urge that the writ of certiorari should permit the Court to act on Eastern's contention that federal court power may be exerted to prevent the unjustifiable interference by defendants with Eastern's rights and duties as a certificated air carrier under the Federal Aviation Act (see Eastern's Petition pp. 20-23).

CONCLUSION

We submit that the Solicitor General is correct in recommending that the writ of certiorari be granted, but we urge that the writ not be limited as suggested by the Solicitor General.

Respectfully submitted,

/s/ E. Smythe Gambrell
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